2017

The State of Utah, Plaintiff/Appellee vs. Theophelus Clay McClellan, Defendant/Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee,

vs.

THEOPHELUS CLAY MCCLELLAN,
Defendant/Appellant.

ANDERS BRIEF

Appellate Case No. ~~20160237~~ 20160506-CA
District Court Case No. 151902837FS

Appeal from the Third District Court, Salt Lake County, Judge Mark Kouris Presiding

Appellant is not currently incarcerated in connection with this matter.

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PREAMBLE AND CERTIFICATION

I have submitted this brief under *Anders v. California*, 386 U.S. 738 (1967). I hereby certify that despite reasonable efforts, I have not been able to locate Mr. McClellan in order to give him a copy of this Anders Brief. I have contacted prior counsel for any contact information he may have for Mr. McClellan. Prior counsel could provide only a single telephone number. When I dialed the number, an automated message informed me that the number was no longer in service. I then contacted the licensed private investigation firm Court Ops for assistance in locating him. The agency was able to locate a last known address for him, which is the Crossroads Urban Center in Salt Lake City, Utah.

I spoke with a representative of Crossroads on April 5, 2017. I provided her with Mr. McClellan's name, date of birth and known aliases. She informed me that Crossroads does not have any record of providing services to Mr. McClellan. She continued, however, to explain that the agency allows homeless persons to use their address when providing contacting information to the Utah Department of Motor Vehicles. Crossroads was not able to provide any further assistance in locating Mr. McClellan.

Since the time of my appointment to this case, I have not received any contact from Mr. McClellan whatsoever.

I am aware of the requirements for *Anders* brief set forth in *State v. Wells*, 2000 UT App 304, 13 P.3d 1056, specifically the requirement that the brief be delivered to the client for additional input on issues that should be addressed. Under the circumstances, I have no means of complying with this requirement, so I respectfully request that the Court waive this requirement for this case.

After carefully examining the record and researching the governing law, I have concluded that an appeal based on the potential issues apparent from the record would be legally frivolous. I request, therefore, the Court' permission to withdraw as attorney of record and allow Mr. McClellan, if he develops an interest in the appeal, to submit any further briefs that he deems necessary.

Dated this 6th day of April, 2017.

CORBETT & GWILLIAM, PLLC

David M. Corbett
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TABLE OF AUTHORITIES

[1] All rules and statutes are attached as Addendum 1.

STATEMENT OF JURISDICTION

This Court has jurisdiction under Utah Code Ann. 78A-4-103(e) (2012).

STATEMENT OF THE ISSUES

I. Whether the trial court erred when it denied Mr. McClellan's motion to withdraw his guilty plea.

1. Standard of Review: This Court reviews whether a trial court incorrectly denied a motion to withdraw a guilty plea for abuse of discretion. *State v. Benvenuto*, 983 P.2d 556, 558 (Utah 1999). The trial court's underlying factual determinations are reviewed for clear error. *Id.* The "ultimate question of whether the trial court strictly complied with constitutional and procedural requirements for a guilty plea is a question of law that is reviewed for correctness." *Benvenuto*, 983 P.2d at 558.

2. Determinative Law: Utah Code Ann. § 77-13-6 (2008); Utah R. Crim. P. 11; *State v. Ruiz*, 2012 UT 29, 282 P.3d 998; *State v. Alexander*, 2012 UT 27, 279 P.3d 371; *Nicholls v. State*, 2009 UT 12, 976.

3. Statement of Preservation: This issue was preserved at R. 129-30, 131-32, 388-91.

II. Whether the trial court erred when it denied Mr. McClellan's motion to recuse Judge Kouris.

1. Standard of Review: The question of disqualification due to judicial bias is a question of law that the court reviews for correctness, giving no deference to the decision below. *State v. Alonzo*, 973 P.2d 975, 979 (Utah 1998).

2. Determinative Law: *Dahl v. Dahl*, 2015 UT 79, 794 Utah Adv. Rep. 5; *State v. Munguia*, 2001 UT 5, 253 P.3d 1082.

3. Statement of Preservation: This issue was preserved at R. 196, 267-68.

STATEMENT OF THE CASE

On February 18, 2015, the State filed an information against Theophelus Clay McClellan, Jr. (hereinafter "McClellan") with a single count of Theft by Receiving Stolen Property, a Second Degree Felony. R. 1-2. The case proceeded to a preliminary hearing, during which the Court found that probable cause existed to bind McClellan over for trial. R. 72-73. Upon conclusion of the preliminary hearing, McClellan entered into a plea agreement with the State and pleaded guilty to the reduced charge of Attempted Theft by Receiving Stolen Property, a third degree felony. R. 65-73. Upon accepting the plea, the court immediately released McClellan, who had been incarcerated, to Pre-Trial Services and set the case for a sentencing hearing. R. 72-73. McClellan later requested to withdraw from his plea, and the court denied his request. R. 129-30; 131-32; 388-91. McClellan was eventually sentenced for time served and released without probation. R. 289-290.

STATEMENT OF RELEVANT FACTS

The State accused McClellan with driving another person's vehicle while knowing that it had been stolen. R. 1-2. Although he requested and received the appointment of counsel, he filed *pro se* motions seeking immediate dismissal of the case on grounds that he was overcharged, that he had no knowledge the vehicle was stolen and that the vehicle's owner could not identify him. R. 10; 28-51. The court denied the motion to dismiss and set the matter for a preliminary hearing instead. R. 53. Before the preliminary hearing, McClellan filed a document complaining generally about his court-appointed attorney, and asked the court to "take care of these issues immediately," though the motion did not ask for the appointment of a new attorney. R. 48-56.

The trial court held the preliminary hearing on March 24, 2015. R. 329-64. The same public defender represented McClellan. R. 330. At the commencement of the hearing, McClellan asked to address the court directly; he moved to dismiss the case for deficient evidence and "overcharging.". R. 332-33. He also requested that the court order his attorney to follow his instructions, though he expressed his desire that the case move forward that day with that attorney. R. 333-36. After receiving evidence, the court determined that probable cause existed and bound the case over for trial. R. 359.

After a break, the court recalled McClellan's case. R. 359. McClellan then entered a guilty plea to the reduced charge of Attempted Theft by Receiving Stolen Property, a third degree felony. R. 359-362. The court received McClellan's Statement of the Defendant in Support of Guilty Plea[2] (hereinafter the "Statement"). R. 65-71. In addition to receiving the Statement, the Court engaged in a Rule 11 colloquy with McClellan, reviewing and confirming each of the following rights, warnings, etc.:

1. That McClellan was not under the influence of drugs or alcohol;
2. That he was in a position to make important decisions;
3. That he read and understood English;
4. That he went through the Statement with his attorney and had no questions about it;
5. That he understood his rights to the presumption of innocent and the State's burden of proof, a jury trial, to confront and cross-examine witnesses, and a unanimous verdict;
6. That he understood the possible punishments associated with a third degree felony; and

[2] McClellan's Statement is attached as Addendum 1.

7. That he reviewed the elements of the charge with his attorney.

R. 360-61.[3] The court then received and accepted McClellan's guilty plea to the reduced offense after confirming with him that the stated factual basis—his driving a stolen car knowing that it was probably stolen—is "what happened." R. 362-63. Consistent with the plea agreement, the court released McClellan to pre-trial services pending the scheduled sentencing hearing. R. 72-73; 362-63.

Before sentencing, McClellan filed a *pro se* Motion for Hearing to Compel the Court to Rule on the Expedited Motion to Dismiss the Case. R. 89-96. The motion sought dismissal on the grounds that a third degree felony was overcharging, and that overcharging of that magnitude is "reason enough for a complete dismissal of the case." *Id.* He also filed an affidavit seeking dismissal of his appointed attorney. R. 98-104. Neither the State nor defense counsel responded to the motions.

McClellan failed to appear at his sentencing hearing, and the court issued a warrant for his arrest, leaving the *pro se* motions unresolved. R. 105-109. After his arrest, he again filed *pro se* motions to dismiss the case and replace his public defender, alleging that his attorney "caused alot of duress" on him (sic.). R. 118-121; 125-128. He did not describe the attorney's specific conduct that placed him under duress. At his first hearing after his arrest, McClellan asked to withdraw from his plea because he had received "inadequate and insufficient and

[3] The relevant portion of the plea proceedings are attached as Addendum 3.

incompetent counsel." R. 376. He renewed his request to dismiss the case because he should have been charged with a lesser offense.[4] R. 377.

The court held a hearing on the motion to withdraw the plea on February 8, 2016. R. 383-391.[5] At the hearing, McClellan moved for dismissal on grounds wholly unrelated to the voluntariness of his plea—Fourth Amendment claims apparently related to another case concurrently pending against him—so the trial judge redirected him to issues related to the plea proceedings. R. 385-89. As his grounds for withdrawing his guilty plea, McClellan stated that "[t]here was no evidence against me." R. 389. When asked whether additional grounds existed for withdrawing from his plea, McClellan responded, "Yes, there is no evidence against me." R. 390. Determining that the stated reasons did not justify withdrawal of a guilty plea, the judge denied McClellan's motion. R. 131-32; 390.

Because of the conflict of interest caused by McClellan's *pro se* filings, the original defense counsel withdrew and was replaced by conflict counsel. R. 137; 145. At a hearing on March 7, 2016, replacement counsel asked for time to review the case and hearing transcripts in order to investigate potential problems with McClellan's plea, including whether there was a conflict of interest between him and original counsel that could affect the plea's validity. R. 304-05. The trial court obliged and continued the matter. R. 307-08.

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[4] McClellan had new criminal charges when appeared after his arrest on the bench warrant. R. 378. Those charges were set for a preliminary hearing independently of the hearing on the motion to withdraw from his plea in this case. *Id.*

[5] The relevant portions of the hearing are attached as Addendum 4.

Before the next hearing, McClellan filed a series of *ex parte* communications with the trial court requesting various forms of relief: [6]

1. A ruling on his motion to dismiss. R. 159;
2. Dismissal of the case because his original attorney was not loyal to him and sided with the prosecutor. R. 162-63, 213-15;
3. Dismissal because of overcharging and ineffective assistance of counsel. R. 165-66;
4. That he was entitled to a reduction to lesser-included offenses; R. 169-71;
5. Habeas corpus release because of original defense counsel's racist comments and lack of loyalty to his client. R. 177-78;
6. Dismissal of the charges because his original attorney and replacement attorney intentionally deceived him. R. 180-81, 189-94, 217-20, 248, 270-72;
7. Appointment of a third defense attorney for their lack of loyalty to him, including taking the stand of the prosecutor. R. 182-83.
8. Recusal of Judge Kouris as the judge presiding over his case because he did not move the case fast enough, had violated his due process rights, and acted fraudulently. R. 196, 267-68;
9. Dismissal because defense counsel did not provide him with all of the discovery materials. R. 207-08;
10. Release to pre-trial services because of the misconduct of his attorneys. R. 222-25;

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[6] The requests and bases for the relief were made in a very shotgun-like fashion—very broad and non-specific. The communications contained very broad, sweeping allegations without any real description of the specific facts supporting them. As counsel has not been able to locate McClellan for additional details that may serve as a basis to supplement the record, counsel has been unable to assess the claims further for lack of factual specificity.

11. Release because the court would not rule on his motions. R. 226-27;

12. Release to pretrial services on a demurrer theory. R. 229-34;

13. Dismissal of the charges on Fourth Amendment grounds. R. 236-40;

14. Dismissal of the charges because he did not understand what his original attorney explained to him before he entered the plea. R. 243;

Because McClellan filed the requests in an *ex parte* manner, the Court did not take any action on the requests, except that it forwarded the recusal requests to the presiding judge for determination "as to whether a legally sufficient issue has been raised." R. 274. On assignment from the presiding judge, Associate Presiding Judge Ryan Harris denied the request on the grounds that McClellan's "non-specific complaints simply do not allege the sort of circumstances that typically amount to 'deep-seated favoritism or antagonism' against Defendant." R. 276-78.

McClellan appeared at his sentencing hearing on June 15, 2016. R. 314-323. Replacement counsel, about whom McClellan complained in his *ex parte* filings, represented him. R. 16. McClellan entered into a plea in a separate case and was sentenced in both cases to time served with immediate release from incarceration. R. 3-7. Despite the McClellan's flurry of activity between hearings, and his tendency to address the court directly in other hearings, McClellan did not speak other than to answer questions related to the voluntariness of his plea in the other case. *Id.* Neither he nor his attorney asked the trial court to address any of the concerns raised in the multitudinous pleadings. *Id.*

SUMMARY OF THE ARGUMENT

Issue I:

McClellan cannot overcome the trial court's conclusion that his guilty pleas were knowing and voluntary. A defendant seeking to withdraw a guilty plea must prove that his plea was not knowingly and voluntarily made. To prove that a plea was not knowing or voluntary, the defendant must show either that he did not in fact understand the nature of the constitutional protections that he was waiving by pleading guilty, or that he had such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt.

A prerequisite to entering a knowing and voluntary plea is that the defendant must be mentally competent to enter it. McClellan cannot prove that he lacked the ability to understand the proceedings and the consequence of his plea.

Further, nothing in the record indicates that McClellan did not act knowingly or voluntarily when he pleaded guilty. A defendant does not enter a knowing and voluntary plea if his attorney made a material representation to induce him to plead guilty. The record does not contain any indication that McClellan's attorneys made misrepresentations to him or otherwise acted contrary to his interests.

Finally, the trial court's strict compliance with Utah Rule of Criminal Procedure 11 ("Rule 11") also prevents McClellan from arguing that his plea was not knowing or voluntary. When a trial court complies with all the provisions of Rule 11, the court forecloses many potential arguments that the defendant's plea was not knowingly and voluntarily made. The trial court strictly complied with Rule 11 by having McClellan read and execute a statement in

support of his guilty plea, by ensuring that he understood it, by ensuring that he understood the elements of the offenses to which he was pleading guilty and that he was waiving his many constitutional rights.

Issue II:

McClellan cannot show on direct appeal that his conviction should be reversed because of the trial judge was biased against him. Appellate courts have long held that motions seeking to disqualify a judge must identify an extrajudicial source of the bias. A finding of bias usually cannot stem for occurrences in the courtroom. Adverse rulings alone are insufficient to establish the existence of bias. None of the rulings approach support the conclusion that Judge Kouris had a deep-seated animosity against McClellan. To the contrary, his actions indicate judicial temperance and objectivity.

ARGUMENT

I. There is no appealable issue as to whether McClellan knowingly and voluntarily pleaded guilty.

McClellan cannot overcome the trial court's conclusion that he had identified insufficient justification for withdrawing from his plea. A defendant seeking to withdraw a guilty plea must prove that his plea was not knowingly and voluntarily made. Utah Code Ann. § 77-13-6(2)(a) (2008); *State v. Ruiz*, 2012 UT 29, ¶ 37, 282 P.3d 998; *State v. Alexander*, 2012 UT 27, ¶ 23, 279 P.3d 371. To prove that a plea was not knowing or voluntary, the defendant "must show either that he did not in fact understand the nature of the constitutional protections that he was waiving by pleading guilty, or that he had such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt."

Alexander, 2012 UT 27, ¶ 23 (internal citations omitted). Unfortunately, McClellan cannot satisfy this burden.

A. Nothing in the record indicates that McClellan was incompetent to enter a plea.

McClellan cannot prove that he lacked the ability to understand the nature and consequences of his guilty plea. "A prerequisite to entering a knowing and voluntary plea is that the defendant must be mentally competent to enter it." *Nicholls v. State*, 2009 UT 12, ¶ 20, 203 P.2d 976. A defendant is incompetent if a mental disorder renders him unable "(1) ... to have a rational and factual understanding of the proceedings against him or of the punishment specified for the offense charged" or "(2) ... to consult with his counsel and to participate in the proceedings against him with a reasonable degree of rational understanding." Utah Code Ann. § 77-15-2 (2008).

A trial court must ascertain a defendant's competency where there is a substantial question of possible doubt as to the defendant's competency at the time of the guilty plea. *Jacobs v. State*, 2001 UT 17, ¶ 13, 20 P.3d 382, *citing State v. Holland*, 921 P.2d 430, 433 (Utah 1996). But it is not required to question a defendants competency "unless defense counsel, the prosecutor, or the custodian of a defendant files a petition alleging incompetence." *Nicholls*, 2009 UT 12 at ¶ 22.

While defining competency is a legal matter, whether a defendant is competent to enter a guilty plea is reviewed for clear error. *State v. Barzee*, 2007 UT 95, ¶ 83, 177 P.3d 48. "To show clear error, the appellant must marshal all of the evidence in support of the trial court's finding and then demonstrate that the evidence, including all reasonable inferences drawn

therefrom, is insufficient to support the findings against an attack." *State v. Higginbotham*, 917 P.2d 545, 548 (Utah 1996).

McClellan cannot prove that he was not competent to enter a guilty plea. During his colloquy with the trial judge preceding his plea, McClellan's answers and language demonstrate his understanding and mental status. He affirmatively stated that he was not under the influence of drugs and alcohol. He stated that he was in an position to make "important decisions." McClellan understood the English language and reviewed the plea Statement with his counsel. His Statement affirmed these facts, but it added much more: McClellan affirmed that he believed himself to be of "sound and discerning mind and to be mentally capable of understanding these proceedings and the consequences of [his] plea." Moreover, he certified that he was "free of any mental disease, defect or impairment that would prevent him from understating what [he] was doing or from knowingly, intelligently, and voluntarily entering [his] plea." R. 69.

After reviewing each page of the record, counsel cannot locate any evidence suggesting that McClellan suffered from any kind of condition that could render him incompetent to enter a plea. Nothing indicates that the Court should have identified the issue *sua sponte*, and counsel cannot identify any indication that a party raised the issue of competence to the court. Similarly, counsel cannot identify any evidence suggesting that trial counsel should have identified a competency problem and raised it to the trial judge. Any appeal based on McClellan's competence would, therefore, be frivolous.

B. Nothing in the record indicates that trial counsel's conduct resulted in an invalid plea.

Ineffective assistance of counsel contributes to a flawed guilty plea when counsel's performance renders the plea involuntary or unknowing. *State v. Rhinehart*, 2007 UT 61, ¶ 13, 167 P.3d 1046. A plea is not voluntary when made with "an exaggerated belief in the benefits of a plea." *State v. Copeland*, 765 P.2d 1266, 1275 (Utah 1988)[7], *quoting People v. Lawson*, 255 N.W.2d 748, 750 (1977). *See also Hammond v. United States*, 528 F.2d 15 (4th Cir. 1975) (incorrect statement to defendant that maximum prison term was much higher than the law allowed rendered plea involuntary, as defendant believed that he minimized his risk by a greater degree).

A guilty plea "entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, *or his counsel*" normally must stand. *Brady v. United States*, 90 S.Ct. 1463, 1472 (1970) (emphasis added). But a plea may not stand where it is induced by misrepresentation, including "unfulfilled or unfulfillable promises." *Id. See also Santobello v. New York*, 92 S.Ct. 495, 499 (1971) (when a plea rests on a promise ..., such promise must be fulfilled). According to *Brady,* defense counsel's misrepresentation of the plea benefits may plea involuntary even where no evidence suggests that the prosecutor made the promise. In the context of a guilty plea, a defendant satisfies *Strickland's* prejudice prong by proving that "but for counsel's errors, he would not have

[7] *Copeland* was superseded by statute on other grounds. *See State v. Swagger*, 2013 UT App 164, ¶ 10, 306 P.3d 840.

pleaded guilty and would have insisted on going to trial." *State v. Martinez*, 2001 UT 12, ¶ 17, 26 P.3d 203.[8]

In his *ex parte* filings, McClellan repeatedly states that his attorney misled him about the case before or at the time he entered his plea. Unfortunately, he did not describe in any sort of detail how his attorney deceived him. He does not identify any specific statements that he believed were misleading or otherwise resulted in an involuntary plea. Moreover, his statements during the hearing on his request to withdraw from his plea cannot support him on appeal: He told the judge that no evidence supported the charges, and, when asked if there was anything else, he merely repeated the same claim.

Replacement counsel, who stated he would review the recordings of the prior hearings and investigate whether there was any conflict of interest between McClellan and his original attorney, did not raise any claims related to the original attorney's performance or supplement any information already provided by McClellan.

Finally, McClellan asserted in his *pro se* filings that he was under duress, caused by his counsel, when he entered the plea. Consistent with his other filings, he did not identify the facts and circumstances supporting the claim. He did not identify promises or threats made to him or any other kind of undue influence. And contrary to his duress claims, his Statement avows, "I am entering this plea of my own free will and choice. No force, threats or unlawful influence of any kind have been made to me .... No promises except those contained in this statement have been made to me." Given the lack of specificity in McClellan's claims, and the

[8] *Martinez* was superseded by statute on other grounds. *See State v. Alexander*, 2012 UT 27, ¶ 26 n. 42, 279 P.3d 371.

contrary evidence available in the record, there is an insufficient basis to challenge the validity of his guilty plea on appeal.

C. The trial court strictly complied with Utah Rule of Criminal Procedure 11.

The trial court's strict compliance with Utah Rule of Criminal Procedure 11 ("Rule 11") also prevents McClellan from arguing that his plea was not knowing or voluntary. A plea "is not knowing and voluntary when the defendant does not understand the nature of the constitutional protections that he is waiving, or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." *Alexander*, 2012 UT 27, ¶ 29. Rule 11 is a "prophylactic measure that is designed to protect an individual's rights when entering a guilty plea by ensuring that the defendant receives full notice of the charges, the elements, how the defendant's conduct amounts to a crime, the consequences of the plea, etc." *Id.* at ¶ 17. Furthermore, when a trial court "complies with all the provisions of rule 11, the court forecloses many potential arguments that the defendant's plea was not knowingly and voluntarily made." *Id.* at ¶ 24.

In relevant part, Rule 11 states:

> (e) The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:
>
> > (e)(1) if the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel;
> >
> > (e)(2) the plea is voluntarily made;
> >
> > (e)(3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived;

> (e)(4)(A) the defendant understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements;
>
> (e)(4)(B) there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction;
>
> (e)(5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;
>
> (e)(6) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, what agreement has been reached;
>
> (e)(7) the defendant has been advised of the time limits for filing any motion to withdraw the plea; and
>
> (e)(8) the defendant has been advised that the right of appeal is limited.
>
> These findings may be based on questioning of the defendant on the record or, if used, a written statement reciting these factors after the court has established that the defendant has read, understood, and acknowledged the contents of the statement. If the defendant cannot understand the English language, it will be sufficient that the statement has been read or translated to the defendant.

Reviewing the trial court's questioning of McClellan and the written statement he executed, the trial court strictly complied with Rule 11, with evidence in the record supporting a finding that each element of Rule 11(e) was met:

- (e)(1) McClellan was advised of his right to counsel and did not waive it.
- (e)(2) McClellan executed a certificate of voluntariness that he was acting "of [his] own free will and choice. No force, threats or unlawful influence of any kind have been made to get me to plead guilty ... No promises except those contained in this statement have been made to me."

- (e)(3) McClellan was advised of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived.
- (e)(4)(A) McClellan was advised of the elements of the crimes to which he was pleading guilty, that the prosecution would have the burden to prove those elements beyond a reasonable doubt, and that a guilty plea was an admission of those elements.
- (e)(4)(B) A factual basis for the plea was provided.
- (e)(5) McClellan was advised of the potential sentence that he could receive, any minimum mandatory sentence, and the possibility of consecutive sentences.
- (e)(6) The trial court was advised of the plea deal that McClellan accepted.
- (e)(7) McClellan was advised of the time limits to file a motion to withdraw his plea.
- (e)(8) McClellan was also advised of his right to appeal if he were convicted by a jury and that his right to appeal after pleading guilty would be limited.

Although the trial court did not discuss all of Rule 11's requirements from the bench, McClellan's Statement filled in any gaps in the hearing colloquy. Further, the Statement's certification of voluntariness stated,

> I have read this statement, or I have had it read to me by my attorney, and I understand its contents and adopt each statement in it as my own. I know that I am free to change or delete anything contained in this statement, but I do not wish to make any changes because all of the statements are correct.

McClellan signed the Statement, and his attorney certified that McClellan had "read the

statement or that [he] read it to him."

As illustrated, the trial court strictly complied with Rule 11 by having McClellan execute the Statement and ensuring that McClellan read and understood it. It also had a colloquy with him to ensure that he was acting knowingly and voluntarily. Therefore, inasmuch as the trial court strictly complied with Rule 11, McClellan cannot show that the trial court committed clear error when it found that he acted knowingly and voluntarily when he pleaded guilty.

II. There is insufficient evidence to support McClellan's claim that Judge Kouris was biased against him.

A judge should be disqualified when competent evidence suggests that the judge's "impartiality might reasonably be questioned." *State v. Gardner*, 789 P.2d 273, 278 (Utah 1989). But appellate courts have long held that motions seeking to disqualify a judge must identify an extrajudicial source of the bias. *State v. Munguia*, 2011 UT 5, ¶ 17, 253 P.3d 1082. Bias or prejudice usually cannot stem for occurrences in the courtroom. *Id.* Adverse rulings alone "are insufficient to establish the existence of bias." *Dahl v. Dahl*, 2015 UT 79, ¶ 52, 794 Utah Adv. Rep. 5. Indeed, the United States Supreme Court has emphasized this rule:

> Opinions formed by judges on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or a partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

Liteky v. United States, 510 U.S. 540, 555 (1994).

In this case, the record lacks any support for a claim that Judge Kouris was biased. McClellan's bias claims derive solely from his frustration with adverse rulings. Yet he fails to identify specifically which rulings demonstrate bias, so it is impossible to evaluate which rulings he believes manifest bias.

Counsel has reviewed each of the rulings made by Judge Kouris. None of the rulings can support a conclusion that he had a deep-seated animosity against McClellan. To the contrary, his actions indicate judicial temperance and objectivity. For example, although not bound by recommendations made in the plea agreement, he followed the recommendations to release McClellan from jail on the day he entered his plea and then, at sentencing, released McClellan from incarceration with credit for time served without even imposing terms of probation on him for a felony offense. Judge Kouris allowed McClellan to delay proceedings so that his attorney could investigate claims related to the voluntariness of his plea and work out global resolutions to the cases pending against him.

A review of the record indicates that any challenge to Judge Kouris's impartiality would be wholly without merit.

CONCLUSION

In accordance with *Anders v. California*, I have examined the record for issues which might arguably support an appeal. In my opinion, there are none. Consequently, I respectfully move to withdraw from this case in accordance with *Anders* and ask the Court to rule on this appeal accordingly.

Respectfully submitted this 12th day of April, 2017.

CORBETT & GWILLIAM, PLLC

David M. Corbett
Attorneys for Defendant/Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 24(F)(1)

I hereby certify that this brief complies with the requirements of Rule 24(f)(1) of the Utah Rules of Appellate Procedure. This is a principal brief which must contain fewer than 14,000 words. I have used the word processor to count the amount of words in this brief, excluding words in the table of contents, table of citations, and the addenda. The total number of words in this brief is 5,050.

An employee of CORBETT & GWILLIAM, PLLC

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing **ANDERS BRIEF** to be sent via first class U.S. Mail, postage prepaid, on the 11th day of April, 2017, to:

Utah Attorney General's Office
Criminal Appeals Division
Heber M. Wells Building
160 East 300 South
6th Floor
Salt Lake City, UT 84114-0854
Attorneys for Plaintiff/Appellee

An employee of CORBETT & GWILLIAM, PLLC

Addendum

Addendum 1
Relevant Statutes and Rules

Rule 11. Pleas.

(a) Upon arraignment, except for an infraction, a defendant shall be represented by counsel, unless the defendant waives counsel in open court. The defendant shall not be required to plead until the defendant has had a reasonable time to confer with counsel.

(b) A defendant may plead not guilty, guilty, no contest, not guilty by reason of insanity, or guilty and mentally ill. A defendant may plead in the alternative not guilty or not guilty by reason of insanity. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(c) A defendant may plead no contest only with the consent of the court.

(d) When a defendant enters a plea of not guilty, the case shall forthwith be set for trial. A defendant unable to make bail shall be given a preference for an early trial. In cases other than felonies the court shall advise the defendant, or counsel, of the requirements for making a written demand for a jury trial.

(e) The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:

(e)(1) if the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel;

(e)(2) the plea is voluntarily made;

(e)(3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived;

(e)(4)(A) the defendant understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements;

(e)(4)(B) there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime was actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction;

(e)(5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;

(e)(6) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, what agreement has been reached;

(e)(7) the defendant has been advised of the time limits for filing any motion to withdraw the plea; and

(e)(8) the defendant has been advised that the right of appeal is limited.

These findings may be based on questioning of the defendant on the record or, if used, a written statement reciting these factors after the court has established that the defendant has read,

understood, and acknowledged the contents of the statement. If the defendant cannot understand the English language, it will be sufficient that the statement has been read or translated to the defendant.

Unless specifically required by statute or rule, a court is not required to inquire into or advise concerning any collateral consequences of a plea.

(f) Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty, no contest or guilty and mentally ill is not a ground for setting the plea aside, but may be the ground for extending the time to make a motion under Section 77-13-6.

(g) If the defendant pleads guilty, no contest, or guilty and mentally ill to a misdemeanor crime of domestic violence, as defined in Utah Code Section 77-36-1, the court shall advise the defendant orally or in writing that, as a result of the plea, it is unlawful for the defendant to possess, receive or transport any firearm or ammunition. The failure to advise does not render the plea invalid or form the basis for withdrawal of the plea.

(h)(1) If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the agreement shall be approved or rejected by the court.

(h)(2) If sentencing recommendations are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

(i)(1)The judge shall not participate in plea discussions prior to any plea agreement being made by the prosecuting attorney.

(i)(2) When a tentative plea agreement has been reached, the judge, upon request of the parties, may permit the disclosure of the tentative agreement and the reasons for it, in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved.

(i)(3) If the judge then decides that final disposition should not be in conformity with the plea agreement, the judge shall advise the defendant and then call upon the defendant to either affirm or withdraw the plea.

(j) With approval of the court and the consent of the prosecution, a defendant may enter a conditional plea of guilty, guilty and mentally ill, or no contest, reserving in the record the right, on appeal from the judgment, to a review of the adverse determination of any specified pre-trial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(k) When a defendant tenders a plea of guilty and mentally ill, in addition to the other requirements of this rule, the court shall hold a hearing within a reasonable time to determine if the defendant is mentally ill in accordance with Utah Code Ann. § 77-16a-103.

(l) Compliance with this rule shall be determined by examining the record as a whole. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded. Failure to comply with this rule is not, by itself, sufficient grounds for a collateral attack on a guilty plea.

Advisory Committee Notes

West's Utah Code Annotated
Title 77. Utah Code of Criminal Procedure
Chapter 13. Pleas (Refs & Annos)

U.C.A. 1953 § 77-13-6

§ 77-13-6. Withdrawal of plea

Currentness

(1) A plea of not guilty may be withdrawn at any time prior to conviction.

(2)(a) A plea of guilty or no contest may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made.

(b) A request to withdraw a plea of guilty or no contest, except for a plea held in abeyance, shall be made by motion before sentence is announced. Sentence may not be announced unless the motion is denied. For a plea held in abeyance, a motion to withdraw the plea shall be made within 30 days of pleading guilty or no contest.

(c) Any challenge to a guilty plea not made within the time period specified in Subsection (2)(b) shall be pursued under Title 78B, Chapter 9, Postconviction Remedies Act, and Rule 65C, Utah Rules of Civil Procedure.

Credits

Laws 1980, c. 15, § 2; Laws 1989, c. 65, § 1; Laws 1994, c. 16, § 1; Laws 2003, c. 290, § 1, eff. May 5, 2003; Laws 2004, c. 90, § 91, eff. May 3, 2004; Laws 2008, c. 3, § 251, eff. Feb. 7, 2008.

U.C.A. 1953 § 77-13-6, UT ST § 77-13-6
Current through 2016 Fourth Special Session.

End of Document

West's Utah Code Annotated
Title 77. Utah Code of Criminal Procedure
Chapter 15. Inquiry into Sanity of Defendant

U.C.A. 1953 § 77-15-2

§ 77-15-2. "Incompetent to proceed" defined

Currentness

For the purposes of this chapter, a person is incompetent to proceed if he is suffering from a mental disorder or mental retardation resulting either in:

(1) his inability to have a rational and factual understanding of the proceedings against him or of the punishment specified for the offense charged; or

(2) his inability to consult with his counsel and to participate in the proceedings against him with a reasonable degree of rational understanding.

Credits
Laws 1980, c. 15, § 2; Laws 1993, c. 142, § 1; Laws 1994, c. 162, § 1.

U.C.A. 1953 § 77-15-2, UT ST § 77-15-2
Current through 2016 Fourth Special Session.

End of Document

Addendum 2
Statement of Defendant in Support of Guilty Plea

FILED DISTRICT COURT
Third Judicial District
MAR 25 2015
SALT LAKE COUNTY
By
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH	:	**STATEMENT OF DEFENDANT IN SUPPORT OF GUILTY PLEA AND CERTIFICATE OF COUNSEL**
Plaintiff,	:	
vs	:	
	:	
Theophelus McClellan	:	Case No. 151902115
Defendant	:	

I, Theophelus McClellan hereby acknowledge and certify that I have been advised of and that I understand the following facts and rights:

Notification of Charges

I am pleading guilty (or no contest) to the following crimes:

	Crime & Statutory Provision	Degree	Punishment Min/Max and / or Minimum Mandatory
A.	Attempt Theft by Receiving 76-6-408(b)	F3	0-5 yrs $5000 + 90%
B.			
C.			
D.			

State agrees to recommend release today. Request PSR and pretrial supervision. Agree to $528.97 Restitution with no restitution hearing. Any other amount may be contested.

I have received a copy of the (Amended) Information against me. I have read it, or had it read to me, and I understand the nature and the elements of crime(s) to which I am pleading guilty (or no contest).

The elements of the crime(s) to which I am pleading guilty (or no contest) are:
On Feb 13, 2015 in Salt Lake County I attempted to retain a vehicle believing it was probably stolen with intent to deprive the owner.

I understand that by pleading guilty I will be admitting that I committed the crimes listed above. (Or, if I am pleading no contest, I am not contesting that I committed the foregoing crimes). I stipulate and agree (or, if I am pleading no contest, I do not dispute or contest) that the following facts describe my conduct and the conduct of other persons for which I am criminally liable. These facts provide a basis for the court to accept my guilty (or no contest) pleas and prove the elements of the crime(s) to which I am pleading guilty (or no contest):

I was driving a stolen vehicle

Waiver of Constitutional Rights

I am entering these pleas voluntarily. I understand that I have the following rights under the constitutions of Utah and of the United States. I also understand that if I plead guilty (or no contest) I will give up all the following rights:

Counsel: I know that I have the right to be represented by an attorney and that if I cannot afford one, an attorney will be appointed by the court at no cost to me. I understand that I might later, if the judge determined that I was able, be required to pay for the appointed lawyer's service to me.

I (have not) (have) waived my right to counsel. If I have waived my right to counsel, I have done so knowingly, intelligently, and voluntarily for the following reasons:

If I have waived my rights to counsel, I certify that I have read this statement and that I understand the nature and elements of the charges and crimes to which I am pleading guilty (or no contest). I also understand my rights in this case and other cases and the consequences of my guilty (or no contest) plea(s).

If I have not waived my right to counsel, my attorney is Jan Ripplinger. My attorney and I have fully discussed this statement, my rights, and the consequences of my guilty (or no contest) plea(s).

Jury Trial: I know that I have a right to a speedy and public trial by an impartial (unbiased) jury and that I will be giving up that right by pleading guilty (or no contest).

Confrontation and cross-examination of witnesses: I know that if I were to have a trial, a) I would have the right to see and observe the witnesses who testified against me and b) my attorney, or myself if I waived my right to an attorney, would have the opportunity to cross-examine all of the witnesses who testified against me.

Right to compel witnesses: I know that if I were to have a trial, I could call witnesses if I chose to, and I would be able to obtain subpoenas requiring the attendance and testimony of those witnesses. If I could not afford to pay for the witnesses to appear, the State would pay those costs.

Right to testify and privilege against self-incrimination: I know that if I were to have a trial, I would have the right to testify on my own behalf. I also know that if I chose not to testify, no one could make me testify or make me give evidence against myself. I also know that if I chose not to testify, the jury would be told that they could not hold my refusal to testify against me.

Presumption of innocence and burden of proof: I know that if I do not plead guilty (or no contest), I am presumed innocent until the State proves that I am guilty of the charged crime(s). If I choose to fight the charges against me, I need only plead "not guilty," and my case will be set for a trial. At a trial, the State would have the burden of proving each element of the charges(s) beyond a reasonable doubt. If the trial is before a jury, the verdict must be unanimous, meaning that each juror would have to find me guilty.

I understand that if I plead guilty (or no contest), I give up the presumption of innocence and will be admitting that I committed the crime(s) stated above.

Appeal: I know that under the Utah Constitution, if I were convicted by a jury or judge, I would have the right to appeal my conviction and sentence. If I could not afford the costs of an appeal, the State would pay those costs for me. I understand that I am giving up my right to appeal my conviction if I plead guilty (or no contest). I understand that if I wish to appeal my sentence I must file a notice of appeal within 30 days after my sentence is entered.

I know and understand that by pleading guilty, I am waiving and giving up all the statutory and constitutional rights as explained above.

Consequences of Entering a Guilty (or No Contest) Plea

Potential penalties: I know the maximum sentence that may be imposed for each crime to which I am pleading guilty (or no contest). I know that by pleading guilty (or no contest) to a crime that carries a mandatory penalty, I will be subjecting myself to serving a mandatory penalty for that crime. I know my sentence may include a prison term, fine, or both.

I know that in addition to a fine, an ninety percent (90%) surcharge will be imposed. I also know that I may be ordered to make restitution to any victim(s) of my crimes, including any restitution that may be owed on charges that are dismissed as part of a plea agreement.

Consecutive/concurrent prison terms: I know that if there is more than one crime involved, the sentences may be imposed one after another (consecutively), or they may run at the same time (concurrently). I know that I may be charged an additional fine for each crime that I plead to. I also know that if I am on probation or parole, or awaiting sentencing on another offense of which I have been convicted or which I have plead guilty (or no contest), my guilty (or no contest) plea(s) now may result in consecutive sentences being imposed on me. If the offense to which I am now pleading guilty occurred when I was imprisoned or on parole, I know the law requires the court to impose consecutive sentences unless the court finds and states on the record that consecutive sentences would be inappropriate.

Plea agreement: My guilty (or no contest) plea(s) (is/are) (is/are not) the result of a plea agreement between myself and the prosecuting attorney. All the promises, duties and provisions of the plea agreement, if any, are fully contained in this statement, including those explained below:

Plea to cnt 1 as Alford F3 dismiss Remainy.

Trial judge not bound: I know that any charge or sentencing concession or recommendation of probation or suspended sentence, including a reduction of the charges for sentencing, made or sought by either defense counsel or the prosecuting attorney are not binding on the judge. I also know that any opinions they express to me as to what they believe the judge may do are not binding on the judge.

Immigration/Deportation: I understand that if I am not a United States citizen, my plea(s) today may, or even will, subject me to deportation under United States immigration laws and regulations, or otherwise adversely affect my immigration status, which may include permanently barring my re-entry into the United States. I understand that if I have questions about the effect of my plea on my immigration status, I should consult with an immigration attorney.

Defendant's Certification of Voluntariness

I am entering this plea of my own free will and choice. No force, threats or unlawful influence of any kind have been made to get me to plead guilty (or no contest). No promises except those contained in this statement have been made to me.

I have read this statement, or I have had it read to me by my attorney, and I understand its contents and adopt each statement in it as my own. I know that I am free to change or delete anything contained in this statement, but I do not wish to make any changes because all of the statements are correct.

I am satisfied with advice and assistance of my attorney.

I am 52 years of age. I have attended school through the 10th grade. I can read and understand the English language. If I do not understand English, an interpreter has been provided to me. I was not under the influence of any drugs, medication, or intoxicants which would impair my judgment when I decided to plead guilty. I am not presently under the influence of any drug, medication, or intoxicants which impair my judgment.

I believe myself to be of sound and discerning mind and to be mentally capable of understanding these proceedings and the consequences of my plea. I am free of any mental disease, defect, or impairment that would prevent me from understanding what I am doing or from knowingly, intelligently, and voluntarily entering my plea.

I understand that if I want to withdraw my guilty (or no contest) plea(s), I must file a written motion to withdraw my plea(s) before sentence is announced. I understand that for a plea held in abeyance, a motion to withdraw from the plea agreement must be made within 30 days of pleading guilty or no contest. I will only be allowed to withdraw my plea if I show that it was not knowingly and voluntarily made. I understand that any challenge to my plea(s) made after sentencing must be pursued under the Post-Conviction Remedies Act in Title 78, Chapter 35a, and Rule 65C of the Utah Rules of Civil Procedure.

Dated this 23 day of March, 2015.

DEFENDANT'S SIGNATURE

Certificate of Defense Attorney

I certify that I am the attorney for _____, the defendant above, and that I know he/she has read the statement or that I have read it to him/her; I have discussed it with him/her and believe that he/she fully understands the meaning of its contents and is mentally and physically competent. To the best of my knowledge and belief, after an appropriate investigation, the elements of the crime(s) and the factual synopsis of the defendant's criminal conduct are correctly stated; and these, along with the other representations and declarations made by the defendant in the foregoing affidavit, are accurate and true.

~~ATTORNEY~~ FOR DEFENDANT
Bar No. 9545

Certificate of Prosecuting Attorney

I certify that I am the attorney for the State of Utah in the case against _____, defendant. I have reviewed this Statement of Defendant and find that the factual basis of the defendant's criminal conduct which constitutes the offense(s) is true and correct. No improper inducements, threats, or coercion to encourage a plea has been offered to defendant. The plea negotiations are fully contained in the Statement and in the attached Plea Agreement or as supplemented on the record before the Court. There is reasonable cause to believe that the evidence would support the conviction of defendant for the offense(s) for which the plea(s) is/are entered and that the acceptance of the plea(s) would serve the public interest.

PROSECUTING ATTORNEY
Bar No. 13588

Order

Based on the facts set forth in the foregoing Statement and the certifications of the defendant and counsel, and based on any oral representations in court, the Court witnesses the signatures and finds the defendant's guilty (or no contest) plea(s) is/are freely, knowingly, and voluntarily made.

IT IS HEREBY ORDERED that the defendant's guilty (or no contest) plea(s) to the crime(s) set forth in the Statement be accepted and entered.

Dated this 24th day of March, 2015.

District Court Judge

10/10 felony plea - cd

Addendum 3
Plea Colloquy Transcript

the Court to dismiss.

THE COURT: Well, at this stage of the proceeding, I'm required to make reasonable inferences in favor of the State. It doesn't mean that those inferences persist through trial, but this isn't trial. This is preliminary hearing. Based on that, I think reasonable inference can be made that the defendant knew the car was stolen, knew about the stolen plates, and therefore, I'm going to bind over on each of the two counts, set a status hearing in front of Judge, Kouris.

COURT CLERK: I can do March 30, at 8:30.

MR. POPPLETON: I'm going to be out of town that day, Judge.

COURT CLERK: April 6?

MR. POPPLETON: April 6 is fine.

THE COURT: Okay, counsel, do you want to retrieve your exhibits?

[Court calls unrelated cases].

MR. POPPLETON: Judge, would you recall the Theophelus McClellan case?

THE COURT: Case number 151902115?

MR. POPPLETON: And if we could approach briefly, Judge.

THE COURT: Sure. So we're back on the record in case number 151902115. Mr. McClellan's here again. Mr. McClellan, counsel informs me you're prepared to enter a plea to a, was it a

third-degree felony?

MR. POPPLETON: Yes.

THE COURT: Is that correct, Mr. McClellan?

MR. MCCLELLAN: Yes, sir.

THE COURT: Are you under the influence of any drugs or alcohol today?

MR. MCCLELLAN: No, sir.

THE COURT: Do you feel you're in a position to make important decisions? Do you feel like you're in a good place to make important decisions today?

MR. MCCLELLAN: Yeah.

THE COURT: Okay. Do you read and understand English all right?

MR. MCCLELLAN: Yes.

THE COURT: Did you go through a written form with counsel today?

MR. MCCLELLAN: Yes, sir.

THE COURT: Do you have any questions for me about that form at all?

MR. MCCLELLAN: I do not.

THE COURT: Okay, so you understand that by entering a plea here, you would be giving up your presumption of innocence?

MR. MCCLELLAN: Yeah.

THE COURT: You give up the right to trial by jury, the right to confront the witnesses against you and cross examine

them, the right to require the State to prove beyond a reasonable doubt each of the elements of the crime charged, and that a jury would have to reach a unanimous verdict as to those elements. You got to answer audibly. The only record we have is--

MR. MCCLELLAN: Yeah.

THE COURT: Okay. This is a third-degree felony. It's punishable by up to five years in prison, and a fine of up to $9,500 when you include sur charges. Do you understand that?

MR. MCCLELLAN: Yes.

THE COURT: Okay. Have you gone through the elements of the charges of the counsel?

MR. POPPLETON: Yes, we have, Judge.

THE COURT: Okay. Counsel, any reason we shouldn't proceed with a plea today?

MR. POPPLETON: No.

THE COURT: Okay, if you haven't already, go ahead and sign the form, and for the record, while Mr. McClellan executes that, could I have a factual basis please?

MR. POPPLETON: Yes, Judge, let me look at my form here--

THE COURT: Okay, sorry.

MR. POPPLETON: Your Honor, yeah, so the elements and the facts that support those elements would be on February 13 of this year in Salt Lake County, Mr. McClellan attempted to retain a vehicle, believing it was probably stolen with the intent to

deprive the owner. The facts are, in essence, he was driving a stolen vehicle.

THE COURT: Is that what happened, sir?

MR. MCCLELLAN: Yeah.

THE COURT: And you understand that by entering this plea, you're essentially admitting to those facts and the elements of the amended charge? And effectively, you're giving up your rights to appeal. Do you understand that?

MR. MCCLELLAN: Yeah.

THE COURT: All right. Well then for the record, as to the charge of--is it, are we amending by attempt? Is that what--

MR. POPPLETON: Attempt.

THE COURT: --attempted theft by receiving stolen property, a third-degree felony, on February 13, 2015. How do you plead?

MR. MCCLELLAN: Guilty.

THE COURT: I'll accept your plea, find that it was knowing, voluntary and intelligently made. Order a pre-sentence report. Is that right?

MR. POPPLETON: Yes.

THE COURT: Okay, and we'll set it for sentencing in front of the assigned judge, and I believe, counsel, you indicated you wanted to address Mr. McClellan's release status?

MR. POPPLETON: Yes, Judge. As I indicated, and I noted on the front of that form, the State is going to affirmatively

stipulate or agree that he be released and ordered to pre-trial services. I have an order of release to pre-trial services here if the Court is inclined to follow that recommendation.

Also, as indicated on the first part of that, Mr. McClellan, as part of this deal is agreeing to pay the noted amount in restitution without a restitution hearing. That number is approximately $528. There's also an agreement that if the State seeks additional restitution greater than that amount, that that portion would be subject to dispute via a restitution hearing.

THE COURT: All right. Is that right, Mr. McClellan?

MR. MCCLELLAN: Yes.

THE COURT: Okay. All right, I'll sign the release to pre-trial services. Mr. McClellan, a couple things. First, we're going to set a date for sentencing shortly. If you were to make a motion to withdraw your plea, you would have to make that in writing prior to that hearing. It doesn't mean that it's granted. It just means that that motion has to be made prior to being sentenced.

And second, I'm going to put here that you're reporting to pre-trial services. Make sure you do that. A lot of folks mess up with that.

MR. MCCLELLAN: I don't have no [inaudible] the last 10 years.

THE COURT: Yeah, so make sure you do that, and also,

I'm ordering a pre-sentence report, where you'll be talking with Adult Probation & Parole. That'll help the sentencing judge with their decision regarding what to do with this charge. Even given the recommendations, they need that information.

MS. TURNER: And Your Honor, on that pretrial release order, would it be possible to also impose drug and alcohol [inaudible]?

THE COURT: Any problem with that?

MR. POPPLETON: No, Judge, expected.

THE COURT: All right. Okay, good luck, Mr. McClellan.

COURT CLERK: May 18?

THE COURT: Does that work for everybody? May 18?

MR. POPPLETON: Yes, give you a notice of that. Judge, that's all I have if I can be excused.

THE COURT: Yes, thanks.

MR. POPPLETON: Thank you.

Addendum 4
Transcript of Hearing on Motion to Withdraw Plea

SALT LAKE, UTAH; MONDAY, FEBRUARY 8, 2016; 2:05 p.m.

THE COURT: Who's next?

MR. POPPLETON: Judge, if you could call Theo McClellan.

THE COURT: McClellan? Sure. Let's call the case of The State of Utah vs Mr. Theo McClellan. Is mister--oh, he's in custody?

MR. POPPLETON: Yes. Your Honor, did you see his filing that appears to have been filed February 3?

THE COURT: Yes, I have them both here in front of me.

MR. POPPLETON: Okay.

THE COURT: Let's call the case of The State of Utah vs Mr. Theo McClellan. Good afternoon, Mr. McClellan.

MR. MCCLELLAN: Good afternoon.

THE COURT: Counsel?

MR. POPPLETON: Your Honor, it's my understanding that Mr. McClellan intends on addressing the Court himself in a pro se manner, and so I'm here to standby.

THE COURT: I appreciate that, Mr. Poppleton. Mr. McClellan, I've had a chance to read what you've already given me, but whatever else you'd like to add, you're more than welcome to do that.

MR. MCCLELLAN: Yes, sir. This is for the record. I am Theophelus Clay McClellan, pro se, case number 161900526, February 8, 2016. I am respectfully requesting a fast and speedy

trial with evidentiary hearing right now.

This motion herein is to dismiss the charges. This is the case ruling Theophelus Clay McClellan vs The State of Utah, the 2009 ruling, Theophelus Clay McClellan vs The State of California, a 1994 ruling, Michael Grand Foster vs The State of Arizona, a 1997 ruling. The purpose is the federal exclusionary rule, served as a deterrent to unlawful police conduct.

Exclusionary rule, the search warrant. The fourth amendment requires that a search warrant be issued by a magistrate or judge, who must, after receiving an oath of affirmation from the warrant applicant, make an independent, neutral and detached determination whether probable cause exists to believe that particular described property will be found at a particular place.

When applying for a warrant, an officer must present an affidavit that contains facts that support a finding of probable cause. The warrant and the affidavit, or testimony on which it's based, must be legally sufficient. They must contain facts that show a crime was committed, and facts that indicate why evidence will be found in a given place. Cursory, assertions, and [inaudible] allegations will not support a warrant.

The sufficiency of the affidavit is judged based on the totality of the circumstances, State vs Vigh, 871 P.2d 1030, Utah CT APP 1994, contains to observe warrantless arrests. "As every officer knows, our society is overrun with drugs. Many people

rely on the police to fight this war against drug activity. The police officer must resist the temptation to use whatever means possible in fighting this war. Courts will not tolerate a violation of constitutional rights merely because it occurs in the fight against drugs."

Application, the exclusionary rule applicable only to constitutional violations of governmental actors. "A violation of privacy by individuals who is not an agent of the government, is not a constitutional violation. Therefore, the exclusionary rule would not apply to such intrusions." See US vs Jacobsen, 466 US 109, 1984. Thank you.

THE COURT: Well, I'm not exactly sure where we're headed with that. Let me tell you two things that come to mind then. I'm going to have Ms. Turner discuss that as well. As for the portion you talked about a search warrant, this is not a search warrant case. This case apparently, and these are only probable cause. These aren't things that I'm telling you that are truth. These are things that are alleged, is that there was an officer behind you in a vehicle and ran the plate, and the plate came back as a stolen car.

So as a result, they have probable cause to pull you over. Then when they asked you about it--

MR. MCCLELLAN: This isn't the case, Your Honor. This is not that case.

THE COURT: This is what?

MR. MCCELLAN: This is not that case. This case number is 161900526.

THE COURT: Oh, I--

MS. TURNER: [Inaudible]. What you just stated, that is a probable cause--

THE COURT: For this case?

MS. TURNER: It is.

THE COURT: So I guess you might have another case. Does he have a different case number? Would you pull that up? Oh, that's the case that's set for preliminary hearing. That's not the case today. The case today is 151902115. When is his prelim set, Mr. Poppleton?

MR. POPPLETON: The 16th, I believe.

THE COURT: Okay. So that's this coming, a week from tomorrow is the case that you're talking about right there, okay?

MR. MCCLELLAN: I'm requesting an evidentiary hearing on both cases.

THE COURT: Well, you're going to have an evidentiary hearing on the other one, but I think this one you've already entered a plea on.

MR. MCCLELLAN: No, I pulled my plea on this case.

THE COURT: Well, you have to ask the judge if you can pull your plea yet, and I don't see that you have. Could we--

MR. MCCLELLAN: Well, I asked--

THE COURT: Okay, so today is the motion to withdraw

the plea. So tell me, what is the reason that I should withdraw the plea that you've made?

MR. MCCLELLAN: There was no evidence against me. That's why I requested an evidentiary hearing so we can bring forth the evidence that is against me.

THE COURT: Well, that's not the question. The question is, there was a time that you entered a plea. Let me find it here.

MR. MCCLELLAN: And then my counsel. This is--

THE COURT: Hang on. Hang on. It looks like there was a preliminary hearing held in this case, and then we have you, I guess, you were sent out for a pre-sentence report and you didn't show up, and a warrant was issued, and--oh, here it is. You've already entered a plea admitting that on February 13, 2015, in Salt Lake County, I attempted to retain a vehicle believing it was probably stolen with the intent to deprive the owner.

MR. MCCLELLAN: I didn't admit to anything.

THE COURT: Well, you signed it.

MR. MCCLELLAN: I didn't admit to anything.

THE COURT: Well, you signed it.

MR. MCCLELLAN: Unlawful use of a motor vehicle is not a, it's not a second degree or a third degree.

THE COURT: All right.

MR. MCCLELLAN: I'm being overcharged, and that's why I used the case ruling Theophelus Clay McClellan vs the State of

California in 1998.

THE COURT: All right, very good. Do you have any other reasons you'd like to withdraw that plea?

MR. MCCLELLAN: Yes, there is no evidence against me.

THE COURT: Okay, that's not a valid reason to withdraw a plea. So I'm going to deny that motion.

MR. MCCLELLAN: Well, I'll put in a motion for an evidentiary hearing then.

THE COURT: Okay. We'll put that motion back on the 22nd. My guess is after the 16th, whatever happens to that other case will be put on the 22nd as well, and we'll handle both of those cases at the same time, all right?

MR. MCCLELLAN: No, I refuse, I refuse to have them globalized.

THE COURT: Okay.

MR. MCCLELLAN: I do not want my cases globalized.

THE COURT: That's actually not your call.

MR. MCCLELLAN: Well, it is my call. It's my right.

THE COURT: Really, where do you have that right?

MR. MCCLELLAN: Whatever you do against my rights, I will appeal.

THE COURT: Okay, fair enough. All right, Mr. Poppleton, anything else?

MR. POPPLETON: That's it, Judge, if I can be excused.

MS. TURNER: Your Honor, I'm sorry. We do still have to

have him sentenced, and he's never shown up for the PSR. Can we have the PSR [inaudible]?

THE COURT: Yeah, I was thinking let's wait and see what happens on that other case.

MS. TURNER: Okay.

THE COURT: And then let's do that on the 22nd.

MR. POPPLETON: And is that 8:30 in the morning on the 22nd?

THE COURT: It was, yes, 8:30 in the morning on the 22nd. All right.

MR. POPPLETON: Thank you, Judge.